

PAUL M. McCONKIE (USB# 5881)  
CHRISTIAN C. STEPHENS (USB #9068)  
Assistant Attorneys General  
MARK L. SHURTLEFF (USB #4666)  
UTAH ATTORNEY GENERAL  
160 East 300 South  
P.O. Box 140873  
Salt Lake City, UT 84114-0873  
Telephone: (801) 366-0290  
Facsimile: (801) 366-0292  
Attorneys for the Executive Secretary of the Utah Air Quality Board

**BEFORE THE UTAH AIR QUALITY BOARD**

In the Matter of:	EXECUTIVE SECRETARY'S
Sevier Power Company Power Plant	MEMORANDUM IN OPPOSITION TO
Sevier County, Utah	SIERRA CLUB'S MOTION FOR SUMMARY
DAQE-AN2529001-04	JUDGMENT

Pursuant to Rule 7(c)(1) of the Utah Rules of Civil Procedure, the Executive Secretary of the Utah Air Quality Board ("Executive Secretary") submits this Memorandum in Opposition to Sierra Club's Motion for Summary Judgment dated February 26, 2007. As Sierra Club's motion is premature and the material facts in Sierra Club's motion are disputed, Sierra Club is not entitled to judgment as a matter of law, and the Executive Secretary respectfully submits that the Air Quality Board should deny Sierra Club's Motion for Summary Judgment.

**I. INTRODUCTION**

On October 12, 2004, the Executive Secretary issued an Approval Order to Sevier Power Company to construct and operate a coal-fired power plant in Sevier County, Utah. On November 12, 2004, Sierra Club filed a Request for Agency Action ("RFA") to contest the Approval Order. The Executive Secretary anticipates that the Board will hold a hearing on the merits in September 2007. Sierra Club now moves for summary judgment on the new claim

which is the subject of its pending motion to amend. The Executive Secretary has filed an opposition to the motion to amend which is pending before the Board. Sierra Club's Motion for Summary Judgment should be denied because (1) Sierra Club erroneously relies on an inapplicable federal regulation; and (2) Sierra Club's statement of material facts is controverted such that Sierra Club cannot prevail as a matter of law.

### **Standard of Review**

According to Utah Rule of Civil Procedure 56(c), summary judgment should be granted only when it is clear from undisputed facts, viewing evidence in light most favorable to the nonmoving party, that the opposing party cannot prevail. Warren v. Provo City Corp., 838 P.2d 1125, 1128 (Utah 1992); Lach v. Deseret Bank, 746 P.2d 802, 804 (Utah Ct. App. 1987). If there is any dispute as to any issue material to settlement of the controversy, summary judgment should not be granted. Holbrook Co. v. Adams, 542 P.2d 191, 193 (Utah 1975).

Although Sierra Club correctly cites the summary judgment standard under Rule 56, Sierra Club's additional argument that the appellate review standards set forth in Utah Code Ann. § 63-46b-16(4), apply to the Board's review of the Executive Secretary's action is misplaced. The standards in § 63-46b-16(4) only apply to the Utah Court of Appeals when it reviews the Board's decisions. Since Sierra Club seeks not judicial review in an appellate court, but rather contests an "initial order" of the Executive Secretary pursuant to Utah Admin. Code R307-103-3(1) and Utah Code § 63-46b-3(3), said standards do not apply. Rather, in this proceeding the Board sits as an adjudicative body similar to a trial court, evaluating evidence,

determining the facts from evidence and witness testimony, and making conclusions of law,<sup>1</sup> with the burden of proof being a preponderance of the evidence.<sup>2</sup>

## **II. ARGUMENT**

### **A. Sierra Club's Reliance on the Federal Regulation is Misplaced**

Sierra Club's proposed new claim (No. 10) alleges that "twenty eight months have passed since the Executive Secretary signed the Approval Order for the proposed plant," and that "the AO is now invalid, having expired automatically on or about April 12, 2006." *See* Sierra Club proposed First Amended Request for Agency Action at 9-10. In support of summary judgment on this claim, Sierra Club argues that as a matter of law, the Approval Order automatically expired 18 months after issuance. This is a faulty presumption based on a federal regulation that does not apply to this Approval Order. The federal regulation relied upon by Sierra Club, 40 C.F.R. § 52.21(r)(2), states in pertinent part that "[a]pproval to construct shall become invalid if construction is not commenced within 18 months of receipt of such approval . . . ." This regulation was not incorporated into Utah Admin. Code R307-405-19(1) until the March 2006 Air Quality Board meeting, to become effective in June 2006.<sup>3</sup> Because this federal regulation

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<sup>1</sup>*See* Utah Code Ann. § 63-46b-8, which governs the procedures for formal adjudicative proceedings. Because Sierra Club has filed a Request for Agency Action to contest an Initial Order of the Executive Secretary, this case is a formal adjudicative proceeding. *See also* § 63-46b-3 (commencement of adjudicative proceedings); Utah Admin. Code R307-103-4 ("[c]ontest of an initial order . . . shall be conducted as a formal proceeding"). By contrast, judicial review by the Court of Appeals or the Supreme Court employs different standards, as outlined in § 63-46b-16. It hardly seems plausible that the Legislature would provide one set of standards to govern adjudicative proceedings before the Air Quality Board and another to govern judicial review by the Court of Appeals if the Legislature intended both to apply the same standards. The bright line between these two standards is not blurred simply because these proceedings are adjudicative in nature.

<sup>2</sup> *Walker v. Bd. of Pardons*, 803 P.2d 1241 (Utah 1990) (stating that in administrative proceedings, the burden of proof is a preponderance of the evidence).

<sup>3</sup> *See* Exhibit A. This exhibit contains the amendments proposed to the Utah Air Quality Board at the March 2006 Air Quality Board meeting. It includes both the original rules and the proposed amendments that were ultimately adopted by the Board.

was not part of the rules at the time the Executive Secretary issued the Approval Order, the Approval Order is not subject to that regulation.

On the other hand, Condition 9 of the Approval Order and Utah Admin. Code R307-401-18 govern this question, and both endow the Executive Secretary with broad discretion to revoke the Approval Order if construction has not commenced after 18 months.<sup>4</sup> Neither of these provisions mandate an automatic expiration of the approval order.

Consequently, Sierra Club's legal arguments based upon this federal regulation are without merit.

**B. The Executive Secretary Disputes Sierra Club's Statement of Undisputed Facts**

Rule 7(c)(3)(B) of the Utah Rules of Civil Procedure requires that an opposition memorandum "contain a verbatim restatement of each of the moving party's facts that is controverted" and for each controverted fact, "provide an explanation of the grounds for any dispute . . . ."

In support of its Statement of Facts, Sierra Club attempts to rely upon the preliminary administrative record distributed on February 15, 2007, to show that certain actions did not occur. Because the record is only as broad as the allegations in Sierra Club's Request for Agency Action, there would be no reasonable expectation that the administrative record would contain any documentation concerning a post-permit 18 month review. Consequently, Sierra Club's reliance upon the preliminary administrative record to show what the Executive Secretary

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<sup>4</sup>Utah Admin Code R307-401-18 states that "[a]pproval orders issued by the Executive Secretary in accordance with the provisions of R307-401 will be reviewed 18 months after the date of issuance to determine the status of construction, installation, modification, relocation, or establishment. If a continuous plan of construction, installation, modification, relocation or establishment is not proceeding, the Executive Secretary may revoke the approval order."

may or may not have done in his R307-401-18 review is misplaced.

**1. The Executive Secretary Disputes Sierra Club's Fact No. 3**

The Executive Secretary disputes Sierra Club's Fact No. 3 which states "Eighteen months after the date of the AO - on or about April 12, 2006 - SPC did not submit the required notification of the status of construction."

The Executive Secretary disputes that "SPC did not submit the required notification of the status of construction." A review of the relevant time line demonstrates that the Sevier Power did in fact submit notification of the status of the construction. On November 17, 2005, Sevier Power sent a letter to the Executive Secretary explaining the current status of the SPC project. In that letter, Sevier Power stated that it had not commenced construction due to the ongoing litigation regarding its approval order. *See* Sevier Power Company letter to Executive Secretary attached hereto as Exhibit B. This letter provided the Executive Secretary with information regarding "status of construction, installation, modification, relocation, or establishment" of the SPC project.

Based on this information and upon knowledge of the permit conditions in Sevier Power's Approval Order, the Executive Secretary did not revoke the Approval Order. Whether SPC submitted the "required" notification is a question of law which the Board would determine by applying the law to the facts. Because Sierra Club has misstated the underlying facts, a genuine issue of material fact still exists, such that Sierra Club is not entitled summary judgment.

**2. The Executive Secretary Disputes Sierra Club's Fact No. 4**

Sierra Club's Fact No. 4 states "Eighteen months after the date of the AO - on or about

April 12, 2006 – the Executive Secretary made no determination regarding a revocation of the AO, nor whether an extension of the AO was justified.”

Again, Sierra Club misstates the facts by relying on a preliminary administrative record which would not be expected to contain information on an 18 month review. *See* section B.1. above. Accordingly, a genuine issue of material fact exists on this question, and Sierra Club cannot prevail as a matter of law and is not entitled to summary judgment.

**C. Sierra Club’s Motion for Summary Judgment is Premature**

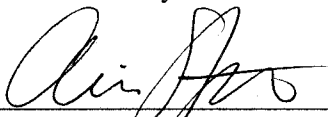
Sierra Club’s Motion for Summary Judgment is premature because it is based upon a new claim that is the subject to a pending motion to amend. In the interest of expediency, however, the Executive Secretary is responding to the merits of Sierra Club’s motion so that it can be heard and resolved at the April board meeting.

**CONCLUSION**

Based upon the foregoing, Sierra Club is not entitled to summary judgment, and its motion should therefore be denied.

Dated this 19<sup>th</sup> day of March, 2007.

MARK L. SHURTLEFF  
Utah Attorney General

  
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PAUL M. McCONKIE  
CHRISTIAN C. STEPHENS  
Assistant Attorneys General

### CERTIFICATE OF SERVICE

I hereby certify that on the 19<sup>th</sup> day of March, 2007, a true and correct copy of the foregoing Executive Secretary's Motion for Partial Judgment on the Pleadings was mailed, postage prepaid, and/or emailed to the following:

Joro Walker

David Becker  
Western Resource Advocates

425 East 100 South  
Salt Lake City, UT 84111

[jwalker@westernresources.org](mailto:jwalker@westernresources.org)  
[dbecker@westernresources.org](mailto:dbecker@westernresources.org)

Fred G Nelson

Assistant Attorney General  
160 East 300 South, 5th Floor

Salt Lake City, UT 84114  
[fnelson@utah.gov](mailto:fnelson@utah.gov)

Fred Finlinson

Finlinson & Finlinson  
11955 Lehi-Fairfield Rd.

Saratoga Springs, UT 84043  
[f2fwcrf@msn.com](mailto:f2fwcrf@msn.com)

Brian Burnett

Callister & Nebeker  
10 West South Temple, Suite 900

Salt Lake City, UT 84114  
[brianburnett@cnmlaw.com](mailto:brianburnett@cnmlaw.com)

Martin K. Banks

Stoel Rives  
201 S. Main, Suite 1100

Salt Lake City, UT 84111  
[mkbanks@stoel.com](mailto:mkbanks@stoel.com)

Michael G. Jenkins

Assistant General Counsel  
PacifiCorp

201 S. Main, Suite 2200  
Salt Lake City, UT 84111  
[michael.jenkins@pacificorp.com](mailto:michael.jenkins@pacificorp.com)

E. Blaine Rawson

Holme, Roberts & Owen  
111 East Broadway, #1100

Salt Lake City, UT 84111  
[rawsonb@hro.com](mailto:rawsonb@hro.com)



PAUL M. McCONKIE  
CHRISTIAN C. STEPHENS  
Assistant Attorneys General